United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

22

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 24,954

UNITED STATES OF AMERICA

v.

NATHANIEL A. HARRIS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES

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2. Is the District Court's finding that Appellant did not possess the heroin in his possession at arrest solely for his own use supported by substantial evidence?
3. Did the District Court err when it denied the Watson Motion to dismiss the indictment as inapplicable under the Robinson case to Appellant who acquired and possessed the narcotics solely for his own use?
4. Does the indictment fail to state a crime which the Court has jurisdiction to try?
5. Is the District Court's finding that Appellant knew the narcotics which he possessed were imported illegally into the United States supported by substantial evidence?

This case has not been before this Court previously.

STATEMENT OF THE CASE

This case comes, for the first time, to the United States Court of Appeals for the District of Columbia Circuit having come from the United States District Court for the District of Columbia, in order to appeal the findings of guilty as to each of two counts in an indictment for alleged violation of 26 U.S.C. 4704(a) and 21 U.S.C. 174.

On January 17, 1970 the Appellant, Nathaniel A. Harris, was arrested and charged with the two above named violations. Appellant was then released on bond. On May 13, 1970, the Grand Jury indicted Appellant for the said two alleged offenses. On September 24, 1970, Appellant was tried before the U. S. District Court for the District of Columbia, without a jury, and was found guilty on both counts of the said indictment. Appellant was again released on bond, pending an appeal of the findings of guilt. Authorization was given the same day by the Trial Judge to obtain a transcript at the expense of the United States. On October 26, 1970, the Trial Judge filed his Findings of Fact and Conclusions of Law. On November 18, 1970, Dr. Richard N. Katon, M.D., Director of Medical Services, NARC, Division of

Narcotics Treatment Administration, Washington, D. C., filed with the District Court a statement affirming Appellant's addiction to heroin. On November 24, 1970, the Trial Judge entered an Order of Committment reciting his belief that the Appellant is an addict as defined under Section 4252 of Title 18, U.S.C., as amended, who is an eligible offender as defined by the said Section 4252 and ordering the Appellant placed in the custody of the Attorney General for an examination. On the same day Appellant entered a notice of appeal of his convictions. On December 29, 1970, copies of the District Court file were forwarded to the U. S. Court of Appeals. The examination of the Appellant in the custody of the Attorney General not having been completed the results are at this time unknown.

STATEMENT OF FACTS

A. The Appellant is a thirty-two year old male, who lives in the District of Columbia (Tr. pp. 4, 7). He had his first "fix" of heroin when he was nineteen years old and has been addicted to heroin for the past 12 years (Tr. p. 7). Appellant's arms, which have numerous small scars on them from injecting drugs through the years, were offered for the trial court to view (Tr. pp. 10-11).

The prosecution's expert on examinations of addicts has made approximately 150 examinations of arms and other physical areas of individuals who are suspected to be addicts in order to make a tentative determination as to whether the person is an addict (Tr. pp. 28-29). This expert also examined Appellant's scarred arms at the trial and concluded that the circular scars which he saw on both arms could represent healed abscesses caused by injecting drugs (Tr. p. 34).

During the 12 years that he has been addicted, Appellant has attempted to free himself of the habit. Approximately three years prior to trial he volunteered and went to St. Elizabeth's Hospital. Then in 1964 when he was convicted of possession of narcotics he was sent to Lexington, Kentucky, in an attempt to help him break the compulsion (Tr. pp. 43, 71-72). His latest attempt at breaking his addiction was his voluntary enrollment in April 1970 in the methadone treatment program, administered here in D. C. by the Narcotic Treatment Administration (Tr. p. 11). He has been taking methadone regularly since April 27, 1970, and has refrained from taking illegal drugs since (Statement of Dr. Katon, M.D. - part of record).

The Assistant U. S. Attorney who prosecuted this case asked the trial court at the conclusion of the trial to consider leaving the Appellant out on bond so he could continue his methadone treatment. The prosecution said: "... I wouldn't like to remove the opportunity of treatment for this man if there really is any hope...." (Tr. pp. 81-82). The trial court left him on bond and instructed the Appellant to continue with his treatment on the methadone program (Tr. p. 84).

On the day that defendant was arrested in this case, January 17, 1970, Appellant's addiction demanded that he inject the powder from 25 capsules a day (Tr. p. 12). Appellant told the police when he was arrested that he was an addict (Tr. p. 32). When he was arrested on a Saturday he was deprived of getting his regular "fix" until after his arraignment, Monday, when he was out again (Tr. p. 14). As a result he suffered a withdrawal reaction during the first night of his imprisonment (Tr. pp. 41-42).

Appellant's counsel offered at trial to make the defendant available for any physical or mental tests which would help the Court with its determination as to whether Appellant is an addict (Tr. p. 47).

B. Appellant had an income from working at Pride, Inc. of $137.00 every two weeks (Tr. p. 8). This was not sufficient to cover his full habit (Tr. p. 8). His habit was 25 capsules a day (Tr. p. 7). He had to pay $75.00 for 175 capsules which was a week's supply (Tr. p. 68). Therefore, his drug habit cost him $10.75 a day. $10.75 a day for two weeks amounts to $150.50. Appellant's income from working at Pride, Inc. was $137.00 every two weeks. This leaves a deficit of $12.50 before other expenses such as rent are considered (Tr. p. 8). Accordingly, Appellant had to sell drugs on the side to make enough money to sustain his habit (Tr. pp. 8-9, 68). On the day he was arrested he was observed selling capsules on the street to other known drug addicts (Tr. p. 17) in order to obtain the money to buy more drugs (Tr. p. 10).

C. Appellant had no knowledge of the origin of the heroin which he possessed upon arrest (Tr. p. 60). He did not know that it was imported into this country, if in fact it was imported (Tr. p. 60). Appellant was a local user who bought locally (Tr. pp. 65-67) and sold, when he had to sell, sold to local friends (Tr. pp. 8, 60). Even the Government's chemist at the trial, Mr.

James Moore, an expert in narcotics, did not know if the capsules that he analyzed for this case were imported (Tr. p. 57).

1. The District Court's finding that Appellant was not addicted to narcotics at the time of his arrest is not supported by substantial evidence.

Under the heading "Statement of Facts", section A, Appellant has set forth fully the facts which establish his addiction to narcotic drugs at the time of his arrest in the case. Those parts of the record in this case which support these facts are referenced in the said "Statement of Facts".

On the other hand, the trial Court's "Finding of Fact and Conclusions of Law" on this issue is based not on substantial evidence, but instead on a conglomeration of non-proof. Specifically, let us examine the Court's "Findings of Fact" step by step.

> "4. In light of the particular circumstances of this offense, including the absence of any physical indicia or evidence of narcotics use or addiction at the time of defendant's arrest (Tr. pp. 20, 38)...."

It is submitted that "the particular circumstances" of this case have firmly established that Appellant is an addict and has

been for years. The Court says "including the absence of any physical indicia or evidence of narcotics use or addiction at the time of defendant's arrest (Tr. pp. 20, 38) ...." Transcript page 20 refers simply to Officer Morrison's testimony that Appellant did not go through withdrawal symptoms during the three hours that Officer Morrison was at the station right after Appellant's arrest. But Appellant's testimony shows (1) that he went through withdrawal symptoms that night (Tr. p. 42) and the strength of your last shot determines how long it is before you need another (Tr. p. 13). The court also refers to Tr. p. 38. That page is merely Officer Caron affirming that from an in court examination of Appellant's arms he could not say whether back on January 17, 1970, Appellant's arms were as marked up as they are now. Also he said again he couldn't remember if Appellant appeared sick or ill. Is this substantial proof on which to base a finding of fact that there was an "absence of any physical indicia or evidence of narcotics use or addiction at the time of defendant's arrest? The Appellant himself is the overwhelming physical evidence and we are confronted here, not with recollections of an investigation or examination of the Appellant at the time of arrest, but rather with the lack of such recollections or with the lack of the proper examination at the time. Specifically,

Officer Caron who is an expert on scar marks on addicts' arms (Tr. p. 29) testified that although he was called in specifically after Appellant's arrest he couldn't recall if he examined Appellant's arms (Tr. p. 31). The other officer who testified, Officer Morrison, also did not examine Appellant's arms for scar marks (Tr. p. 22), and neither of the officers knew if a urine analysis was made (Tr. pp. 23,35) but Caron does remember that Appellant told him he was an addict (Tr. p. 31).

The Court goes on -- "the absence of any narcotics paraphernalia on or about his person at the time of arrest (Tr. pp. 14-15)." This is an admitted fact. But it certainly does not establish that Appellant was not an addict. Appellant testified he was not far from home (Tr. p. 12) and if he needed to take a shot while away from home he could get the paraphenalia from others or buy it (Tr. p. 15).

The Court continues "the absence of any Metropolitan Police Department record of a request for or the administration of medical treatment to the defendant for withdrawal symptoms on the day of or the day after his arrest (Tr. p. 43) in circumstances where such records are normally kept (Tr. p. 25)." In the day of crowded jails and lack of sympathy at the jail house level for drug addicts,

it is submitted that the lack of a written record of Appellant's request for medical attention is not substantial evidence that such a request was not made. Appellant testified that he suffered withdrawal symptoms and asked for medical attention (Tr. pp. 41-42).

The Court continues "the fact that the defendant's only prior conviction in connection with narcotics possession occurred several years prior to this offense (Tr. pp. 48, 71-72)." It is submitted that this statement merely confirms the fact of the Appellant's addiction. Especially in light of the fact that he was sent to Lexington, Kentucky for treatment as an addict for this prior offense (Tr. p. 72).

Then the Court says "and the fact that the defendant did not seek methadone treatment until three months after his arrest in this case (Tr. p. 11)." What proof of lack of addiction is that? Appellant simply kept on taking illegal drugs after his arrest and release on bond until, as he said "Well, I got to a point where I didn't want this, just pushing myself into the ground, so I see this program, Dr. DuPont has [methadone program], so I went down there and asked him for help." (Tr. p. 11)

The Court continues "as well as the Court's doubts as to the credibility of the defendant's testimony" and the Court foot-

notes only two points, which have not been discussed hereinabove, to support this "doubt". One is that the Appellant had been convicted of petty larceny in 1965 (Tr. p. 72). Appellant's trial counsel rightfully pointed out that such conduct would not be unusual for an indigent drug addict (Tr. p. 50). Secondly, the Court referred to the fact that Appellant testified he had not sold drugs until two weeks before he was arrested, although he had been convicted several years earlier for possession and sale. Perhaps Appellant was confused by the question which was asked at transcript page 63. He could have thought the question referred to the recent sales which he had made within a period of time close to his arrest. Appellant had nothing to hide because at transcript page 48 the prosecution had stated in open court that the Appellant had been convicted before of possession and sale of narcotics.

It is therefore submitted that for the reasons stated in the direct rebuttal of the Trial Court's findings and for the reasons stated as part A of the Appellant's Statement of Facts, Appellant was an addict at the time of his arrest and the Trial Court's finding to the contrary is not supported by substantial evidence.

2. The District Court's finding that Appellant did not possess the heroin in his possession at arrest solely for his own use is not supported by substantial evidence.

As to the substantiality of the facts upon which the Trial Court based its finding that Appellant did not possess the heroin for his own use, this Honorable Court is referred to the Appellant's statement of facts, part B, for references to the record which establishes that Appellant possessed the drugs for his own use.

In reading those references to the record concerning solely for his own use Appellant would ask the Court to consider "use" of the drug in the context of meaning (1) to "use" or "take" or "shoot" directly or (2) to "dispose" or "sell" the drug at a profit in order to obtain enough money to buy more heroin for Appellant's further "use". A sale at no profit would not come within this definition because it would not enable the Appellant to make money to buy more pills for himself. Also this definition of "use" assumes that Appellant is an addict who must have drugs to keep going and to avoid painful withdrawal symptoms.

It is easy to see how an addict, without enough money to support his habit, could sustain his habit by selling a few pills at

a profit. Suppose an addict has a 13 pill a day habit and he has $5.00 to spend on drugs per day. Suppose he can get the drugs from his source for $.50 each. This would enable him to buy only 10 pills. That's 3 short of his need. So he can inject the contents of 7 of the pills and sell the other 3 for $1.00 each. With the $3.00 from this sale he can buy 6 pills at $.50 and inject them making his needed daily intake of 13 pills. He can start over the next day with his allotted $5.00.

But let us turn to the Trial Court's finding of fact. The "Finding" stated:

> "5. Even if the defendant, Nathaniel A. Harris, had been addicted at the time of his arrest for possession of the above described heroin, in light of the particular circumstances of the offense, including the observations of the arresting officers as to at least seven different sales of narcotics by the defendant to other persons (Tr. p. 21), the defendant's admission that he was selling narcotics (Tr. pp. 9-10)...."

Appellant submits that this evidence establishes merely that he was in fact selling capsules of narcotics, a point which he has admitted. But these facts do not, in anyway, undermine Appellant's testimony that he was selling the drugs in order to supplement his income with enough money to sustain his addiction (Tr. pp. 8-10, 68).

The Court continues "the large quantity of narcotics - filled capsules found on the defendant's person (Tr. p. 19) ...." Appellant submits that the number of pills (to-wit 179) must be considered in light of how far one pill will go. Appellant had a 25 pill a day habit (Tr. p. 25) thus the 179 pills which he had with him represented, for himself, only a one week supply. The statement of facts, part B, establishes that Appellant was not making enough money at Pride, Inc. to pay for the number of pills which his habit demanded. Also there is no testimony which suggests that he was selling these pills to do anything more than make enough money to keep his habit satisfied.

The Trial Court continues "and the heretofore - noted absence of any physical or other indicia of defendant's addiction at the time of his arrest (Tr. pp. 14-15, 20, 38, 43)...." These points have all been addressed above where Appellant has established that he is and was an addict who needed these drugs and more like them for his own addiction. Again, he sold some at a profit in order to get the money which he didn't have to buy more drugs to meet his physical need.

3. The District Court erred when it denied the Watson Motion to Dismiss the indictment as inapplicable under the Robinson case because the Appellant acquired and possessed the illegal narcotics solely for his own use.

In the Robinson v. California, 370 U. S. 660 (1962), the Supreme Court of the United States reversed a conviction of a drug addict under a California law which made it a misdemeanor to "be addicted to the use of narcotics." (p. 660) The High Court held that "a state law which imprisons a person ... afflicted [with drug addiction] as a criminal ... inflicts a cruel and unusual punishment ... " p. 667. Justice Douglas, concurring said:

"But I do not see how under our system being an addict can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person." p. 674

....

"The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688. p. 675

....

"We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." p. 677

This Honorable Court, in the case of Watson v. United States, No. 21,186, decided July 15, 1970, at p. 19 said that:

> "... if Robinsons' deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature."

Unfortunately for Watson, in the Watson case, supra, this Honorable Court found that the defendant had not laid an adequate basis at trial to be able to raise as a defense on appeal under the authority of Robinson v. United States, supra, the fact that Watson was an addict who possessed drugs only for his own use. However this Court gave future defendants advice as to how to raise such a defense. It said at pages 21, 22 and 23:

> "For the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds, is surely not at a loss to know how to do so.... To the extent that he wishes to assert that the statutes are not to be read as applicable to him, his primary attack should as amicus suggests, be by a motion to dismiss.
>
> ....
>
> "... That is the only way we know of whereby judicial, as distinct from legislative, relief, at both trial and intermediate appel-

> late levels, may be sought by the non-trafficking addict from the rigors of criminal prosecution under existing federal narcotics statutes."

So it was with Appellant Harris in the instant case. His acquisition and possession of narcotics was solely for his own use. As stated and argued above Appellant is and was an addict at the time of his arrest and his possession of the drugs was solely for his own use. The drugs that he sold were sold in order to finance his own drug addiction. Appellant desired to defend on these factual grounds under the authority of Robinson, supra, he so advised the Trial Court (Tr. p. 3) and evidence on the Motion to Dismiss the indictment, as inapplicable to an addict who possesses illegal drugs solely for his own use, was heard and argued (Tr. pp. 3-50). The Trial Judge ruled that the Appellant was not an addict at the time of the offense and possessed drugs for other than his own use. Accordingly, he denied the Motion to Dismiss the indictment (Tr. p. 51). It is submitted that the foundation has been sufficiently laid in Appellant's trial as argued in this brief for this Honorable Court to be able to rule that the Trial Court's findings that Appellant was not an addict at the time of the arrest and possessed drugs not solely for his own use are not supported by substantial evidence. The lack of support for these two findings of the Trial Court

may perhaps be explained by the concept of burden of proof employed by the Court in ruling on the Motion. Appellant submits that the prosecution carelessly misrepresented to the Court the burden of proof which the Watson case discusses. The prosecution said at Tr. p. 44:

> "Your Honor, the Government respectfully requests the Court deny the Motion to Dismiss on the basis of the Watson case.
>
> "Pursuant to the Watson opinion, Judge McGowan wrote at page 22 of the Watson opinion: A defendant raising the Watson defense has two initial burdens. First, he must carry the burden of showing to the Court that he is an addict. Secondly, he must carry the burden of showing that even if he is an addict that the drugs which he possessed were solely for his own use."

In fact that is not what Judge McGowan said at page 22. He said:

> "A defendant raising these matters as affirmative defenses at trial presumably must bear the burden of going forward with evidence which places him in the category of an addict in possession of narcotics solely for his own use. If the prosecution disputes that evidence by a showing of its own, the burden of persuasion beyond a reasonable doubt would appear to rest upon it." (emphasis added)

Appellant submits that to "carry the burden of showing the Court that he is an addict" is far different from "going forward with evidence which places him in the category of an addict." And the Government failed to

even mention its own burden if it disputed Appellant's evidence namely that the Government must show evidence of its own and "the burden of persuasion beyond a reasonable doubt would appear to rest upon it."

Accordingly, the Trial Court was in error under the Robinson case when it refused to grant Appellant's Motion to Dismiss the indictment as not stating that Appellant had committed a crime which the Trial Court had jurisdiction to try.

4. Count 2 of the indictment fails to state a crime which the Court has jurisdiction to try.

At page 23 of the Watson opinion, supra, this Honorable Court said:

> "If a court should rule as a matter of law that the statutes [21 U.S.C. 174 and 26 U.S.C. 4704(a)] either do not, or cannot constitutionally, encompass non-trafficking possessors for personal use, then an indictment which does not allege acts of trafficking arguably would be subject to dismissal as not stating a crime which the court has jurisdiction to try."

It is submitted that count number 2 of the indictment in the instant case does not allege acts of trafficking and is therefore subject to dismissal by this Honorable Court because it does not state a crime which this Court has jurisdiction to try.

Specifically the indictment read in pertinent part as follows:

> "Second count: On or about January 17, 1970, within the District of Columbia, Nathaniel A. Harris received, concealed and facilitated the concealment of a narcotic drug...."

The words "received, concealed and facilitated the concealment" do not state acts of trafficking. They merely state the act of receiving the drug and using it for ones own use. These words were taken from 21 U.S.C. 174. There are a number of words in that section which do state acts of trafficking such as "imports or brings any narcotic drug into the United States ... sells, or in any manner facilitates the transportation ... or sale of any such narcotic drug..." The fact that Count #2 of the indictment against Appellant does not state acts of trafficking means, under the authority of Watson, that if this Honorable Court should rule as a matter of law that 21 U.S.C. 174 does not, or cannot constitutionally, encompass non-trafficking possessor for personal use, then Count #2 of this indictment should be dismissed.

This Court is urged to rule as a matter of law that Congress did not intend to have 21 U.S.C. 174 applied to non-trafficking possessors for personal use. As authority for the Court to so rule, Appel-

lant cites pages 19-21 of the Watson opinion wherein this Court recognizes the argument that Congress did not intend to include non-trafficking addict possessors within the reach of 21 U. S. C. 174. The Court there noted "that §174 is part of the Jones-Miller Act, passed in 1909 and derived from an anti-smuggling law in 1866. Its purpose was to prevent the flow of narcotics into the country...." The Court did not, however, resolve this issue of Congressional intent because the defendant had not defended on this ground at the trial so as to lay a proper groundwork for the consideration of the question on appeal.

In the instant case it is submitted that the proper foundation has been laid at trial for the Court to rule on the validity of this indictment in light of the apparent Congressional intent.

In the alternative, Appellant would ask this Honorable Court to rule as a matter of law that Robinson v. United States, supra, makes invalid 21 U. S. C. 174 as applied to non-trafficking addict possessors. Accordingly, this Court should rule that Count 2 of the indictment should be dismissed because it does not allege acts of trafficking and thus does not state a crime which the Court has jurisdiction to try.

5. The District Court's finding that Appellant knew the narcotics which he possessed were illegally imported into the United States is not supported by substantial evidence.

In the 2nd Circuit case of United States v. Peeples,

377 F2d 205 (1967) the U. S. District Court was reversed because of erroneous jury instructions. The District Court had instructed, in a 21 U.S.C. 174 case, that if the jury were confused on the issue of the knowledge which defendant had on the origin of the illegal drugs, then it could find guilt from mere possession. The Circuit Court said the jury should have been instructed that defendant committed no crime by having had unlawful possession of narcotics if he had no knowledge of its unlawful importation since, within the meaning of the statute, an accused need not show lawful possession to merit a not guilty. (Peeples had testified he didn't know where the drugs came from.)

The District of Columbia Circuit has recognized and followed the Peeples case as seen in United States v. Dino Cox, No. 22715, U. S. Court of Appeals for D. C., July 15, 1970.

In the Dino Cox case, this Honorable Court reversed the District Court for failure to give the Peeples instruction in a 21 U.S.C. 174 charge. There the defendant had said he didn't know the narcotics was imported. The District Court was told it should have instructed the jurors "to acquit [the] defendant if satisfied that the defendant did not know the narcotic was imported."

In the instant case, all the evidence which the trial Court

has cited from the record to support its finding that Appellant knew the drugs were illegally imported is circumstantial. The Court said, specifically:

> "3. In light of the particular circumstances of this offense, including the defendant's admitted use of narcotics for a period of twelve years (Tr. p. 7), his admitted dealing in narcotics (Tr. pp. 9-10, 14), his having purchased narcotics from as many as fifty different sources (Tr. p. 70) and his knowledge of various sources of narcotics throughout the District of Columbia (Tr. pp. 70-71) ...."

None of this evidence proves that Appellant knew the drugs which he possessed were imported if they were. Appellant stated that he did not know they were imported (Tr. p. 60). As the Statement of Facts says Appellant was a local user who bought locally (Tr. pp. 65-67) and when he had to sell, sold locally to friends (Tr. pp. 8, 60). He was not an international dealer. As to whether the knowledge that heroin is imported is so widespread, the Government's chemist, Mr. James Moore, an expert in narcotics, did not know if the capsules of heroin that he analyzed for this trial were imported (Tr. p. 57).

The Trial Court then goes on to make several of the same observations that the Supreme Court made in Turner v. United States, 396 U. S. 398, to-wit:

> "It is illegal to import heroin into this country or manufacture it here, it is likewise illegal to grow the opium poppy (the source of heroin) in this country without a license, and the flow of illegally imported opium into the United States is too tightly controlled to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium...."

None of these facts prove that the Appellant had knowledge that the drugs were illegally imported into this country.

The indictment in this case like the indictment in the Turner case, supra, was under 21 U.S.C. 174. The majority said in Turner, at page 404:

> "We turn first to the conviction for trafficking in heroin in violation of §174. Count 1 charged Turner with (1) knowingly receiving, concealing, and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. See Harris v. United States, 359 U. S. 19, 23, 3 L. Ed. 2d 597, 599, 79 S. Ct. 560 (1959). For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt."

The proof in the instant case is as inadequate as the proof was in the Turner case, supra. There Mr. Justice Black was moved to write a forceful dissent. He said at pages 428 and 429:

"...'The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case.'

....

"...'Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from proof of possession alone.... (Emphasis added)

"These passages show that the Government wholly failed to meet its burden of proof at trial on two of the elements Congress deemed essentially to the crime it defined. The prosecution introduced no evidence to prove either (1) that the heroin involved was illegally imported or (2) that Turner knew the heroin was illegally imported. The evidence showed only that Turner was found in possession of heroin.

"I do not think a reviewing Court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's conviction under Count 1 ... I would therefore reverse Turner's conviction under Count 1 without further ado."

The same can be said of the instant appeal, to-wit, the Government has not proved that the heroin was illegally imported or that Harris knew it was imported, if it was. Accordingly, this

Honorable Court should find that the Trial Court's Findings of Fact on this point too is not supported by substantial evidence.

From this it follows that the Trial Court should have found the Appellant not guilty under Count #2 of the Indictment. Since it did not, it should be reversed.

CONCLUSION

The Appellant has shown that the District Court's Findings of Fact are not supported by substantial evidence and has established that:

1. The Appellant was an addict at the time of his arrest.

2. The Appellant was in possession of the drugs solely for his own use.

3. The District Court erred when it denied the Watson Motion to Dismiss the indictments.

4. Count #2 of the indictment fails to state a crime which the District Court has jurisdiction to try.

5. The Appellant did not have knowledge that the drugs in his possession were illegally imported.

6. That the District Court erred in finding Appellant guilty of Count #2.

Respectfully submitted,

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BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,954

UNITED STATES OF AMERICA, APPELLEE

v.

NATHANIEL A. HARRIS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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Cr. No. 738-70

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OTHER REFERENCES

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III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether appellant was validly prosecuted under federal narcotics statutes which apply to him.
2. Whether count two of the indictment, which charged a violation of 21 U.S.C. § 174, was defective because it did not allege acts of trafficking.
3. Whether the evidence was sufficient to support the court's finding that appellant knew the drugs he possessed to have been illegally imported.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,954

UNITED STATES OF AMERICA, APPELLEE

v.

NATHANIEL A. HARRIS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed May 13, 1970, appellant was charged with violations of the federal narcotics laws.[1] After a trial without a jury on September 24, 1970, before the Honorable John J. Sirica, appellant was found guilty as charged. On November 24, 1970, sentencing was deferred while appellant was committed under Title II of the Narcotics Addict Rehabilitation Act (NARA), 18 U.S.C. § 4252, to determine under the guidelines of the Act if he was an addict and was likely to be rehabilitated.

[1] 26 U.S.C. § 4704a; 21 U.S.C. § 174.

Appellant was found to qualify for treatment and was committed for an indeterminate period to the custody of the Attorney General.

The Offense

On January 17, 1970, at approximately 3:45 p.m., Officers Morrison and Perkins of the Metropolitan Police were patrolling in a privately owned automobile when they were approached by one of their informants, who told them that someone was selling narcotics in front of the New Republic Restaurant in the 1200 block of Seventh Street, N.W. (Tr. 17). Acting upon this information, the officers drove to the 1400 block of Seventh Street, where, with the aid of field glasses, they observed approximately seven known narcotics addicts approach appellant and leave shortly thereafter (Tr. 17). They moved from the 1400 block to the 1300 block and observed additional instances when people approached appellant, gave him money in return for an unidentifiable item and left (Tr. 18). The officers then moved their base of observation to a point directly across the street from where appellant was standing and watched as appellant continued in the same course of conduct. He would "go into his pocket, count out capsules and exchange money and the people would leave." (Tr. 18.) The officers got out of their car, placed appellant under arrest and recovered from his pocket two plastic vials, one containing 65 capsules of heroin and the other containing 114 capsules of heroin (Tr. 19, 54).

The Pre-Trial Hearing

Appellant's request for a *Watson* hearing [2] was granted, and appellant testified that he had been an addict for the last twelve years (Tr. 7); that on January 17, 1970, he was using 25 capsules each day; and that he would sell heroin to have enough money to support his own habit

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[2] *Watson* v. *United States*, D.C. Cir. No. 21,186, decided July 15, 1970 (*en banc*).

(Tr. 9-10). He also testified that he needed an injection approximately once every five hours or he would go through withdrawal (Tr. 13), but he admitted on cross-examination that when he left his apartment at approximately 1:30 p.m. on January 17, 1970, he did not take any narcotic paraphernalia with him to use for his next injection (Tr. 14). Although he was arrested at 3:45 p.m. on January 17 (Tr. 13), he claimed not to have gone through withdrawal until 12:30 a.m. on January 18, almost nine hours later (Tr. 41).

Officer Morrison testified to the events of appellant's arrest on January 17 and to the seizure of 179 capsules from appellant's person (Tr. 19). He remembered that when he left the precinct at 7:00 p.m. appellant had not demonstrated any signs of withdrawal, nor did his eyes appear glassy or give any indication of addiction (Tr. 23). He explained that the standard procedure if a prisoner becomes ill is to transport the prisoner immediately to the hospital (Tr. 25). To his knowledge, there were no police records that appellant requested medical assistance or was conveyed to the hospital (Tr. 25-26).

Officer Richard Caron, an investigator for the Narcotics Section of the Metropolitan Police, was qualified as an expert in the field of narcotics (Tr. 29) and testified that on January 17, 1970, at approximately 7:00 p.m., he conversed with appellant, who told him that he was an addict but did not appear to be ill and did not ask for medical treatment (Tr. 31-32). At the hearing Officer Caron then examined appellant's arms and found "an old track mark [3] above one of his veins" (Tr. 34), but he could not be sure as to the cause of the circular scars on both his arms (Tr. 34).

At the close of the hearing the court denied appellant's motion to dismiss the indictment, ruling that appellant neither was an addict at the time of his arrest nor possessed the 179 capsules for his own use (Tr. 51).

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[3] "Track marks" are scar tissue formed after injection into the vein (Tr. 34).

The Trial

The pre-trial hearing testimony of Officers Morrison and Caron was stipulated (Tr. 52-53), and Mr. James Moore, a chemist with the Bureau of Narcotics and Dangerous Drugs, testified that the capsules found on appellant contained 8.3 to 8.4 percent heroin (Tr. 54). Appellant testified that he began selling heroin two weeks before his arrest (Tr. 63), that he had purchased drugs from as many as fifty different people (Tr. 70), but that he did not know where heroin came from (Tr. 59-60). The case then proceeded to verdict.

ARGUMENT

I. Appellant was validly prosecuted under federal narcotics statutes which apply to him.

(Tr. 7, 9-11, 13-14, 19-21, 25, 38, 43, 48, 63, 71-72)

Appellant argues that the trial court erred in finding (1) that he was not an addict at the time of his arrest and (2) that he did not possess the heroin solely for his own use. Since these findings of fact formed the foundation for the court's denial of his motion to dismiss the indictment under the rationale of *Watson* v. *United States*, *supra* note 2, he reasons that this Court must now reverse his convictions. We cannot agree.

The holding in the *Watson* case was a narrow one, specifically that "the two-prior-felony disqualifying exclusion of Title II, as applied to appellant [Watson] on these facts, is unconstitutional under the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment." *Watson* v. *United States*, *supra* note 2, slip op. at 29. In contrast with the narrowness of its holding, this Court noted in dicta a broad scope of questions left for future determination, including (1) whether the statutes under which Watson was indicted were intended to apply to non-trafficking addict possessors, and (2) whether such prosecutions would be in violation of the Eighth Amendment in view of *Robinson* v. *California*,

370 U.S. 660 (1962). Since this Court has therefore never specifically held that proof of non-trafficking addiction requires dismissal of an indictment, we maintain initially that appellant was properly prosecuted under applicable narcotics statutes.

Assuming *arguendo* that *Watson* allows for an attack of the narcotics statutes, we submit that the record conclusively demonstrates that at the time of his arrest appellant was not an addict whose acquisition and possession of narcotics was solely for his own use, *Watson*, slip op. at 21, and, therefore, that he did not qualify under the *Watson* rationale and that his motion to dismiss the indictment was properly denied. "A defendant raising these matters as affirmative defenses at trial presumably must bear the burden of going forward with evidence which places him in the category of an addict in possession of narcotics solely for his own use." *Watson*, slip op. at 22. The Government provided evidence that on January 17, 1970, appellant was seen apparently peddling drugs to at least seven people (Tr. 21). Proof of trafficking was significantly buttressed by the evidence that appellant possessed the huge amount of 179 capsules. Certainly this evidence created a virtually insupportable burden for appellant in his effort to demonstrate that he was a non-trafficking addict who could qualify under the *Watson* guidelines. Moreover, appellant's attempt to assume this burden involved no medical testimony but only his unsupported, self-serving assertion that he qualified under *Watson*. On appeal, he ignores his failure to provide any evidence other than his own testimony but rather attacks the court's findings as not being based on substantial proof. In so doing, he in effect asserts that his blanket assertion of trafficking to earn enough money to support only his own habit must necessarily qualify him for *Watson* treatment. He therefore misconstrues the quantum of evidence necessary to support the court's findings of fact. Those findings cannot be disturbed absent a determination that they are clearly

erroneous. *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965).

To qualify as an addict, appellant must demonstrate that he is more than a mere user of narcotics. He must show that he has lost the power of self-control with reference to his addiction. *Cf. Powell* v. *Texas*, 392 U.S. 514, 524-526 (1968); 18 U.S.C. § 4251 (a); 28 U.S.C. § 2901 (a); 42 U.S.C. § 3411 (a). Inferences reasonably drawn from the facts before the court in the instant case clearly indicate that appellant did not even come close to meeting this burden. First, there is no evidence, other than his own unsupported assertion, that appellant even suffered withdrawal symptoms after he was arrested. To the contrary, the record indicates that the police officers who observed appellant found him in good health (Tr. 20, 38), and the police records do not reflect that appellant requested medical assistance on the day of or on the day after his arrest (Tr. 43).[4] Second, appellant's only previous conviction in connection with narcotics possession occurred several years prior to the instant offense, and this conviction was for possession *and sale* of narcotics (Tr. 48, 71-72). Third, although he was some distance from home when arrested and supposedly required an injection approximately once every five hours (Tr. 13), he carried no narcotics paraphernalia with him to use for his next injection (Tr. 14). Fourth, although he testified that he had been an addict for approximately twelve years (Tr. 7), he further testified that he had not sold narcotics until two weeks before his arrest (Tr. 63). Fifth, he failed to seek methadone treatment until three months after his arrest (Tr. 11).[5]

Appellant has also failed to demonstrate that he was a "non-trafficker." *Watson* v. *United States*, *supra*, slip

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[4] Records of requests for medical treatment are kept by the police in the normal course of business (Tr. 25).

[5] See "Findings of Fact and Conclusions of Law," filed October 26, 1970. For the convenience of the Court a copy of those findings has been included in Appendix A, *infra*, p. 15.

op. at 21-22. Again, instead of providing evidence of possession for his own use, appellant mistakenly attacks the court's findings. He relies on his unsupported allegation that he sold narcotics in order to support his own habit and overlooks his own failure to produce any other evidence to rebut the obvious inference that someone who (1) is observed making at least seven sales to known addicts (Tr. 21), (2) possesses 179 capsules when arrested (Tr. 19), and (3) admits to the sales (Tr. 9-10, 14) is a trafficker.[6] Since the "record is not devoid of any significant indication that appellant was a trafficker in narcotics . . . appellant is not entitled to relief on this ground." *United States* v. *Harrison*, 139 U.S. App. D.C. 266, 268, 432 F.2d 1328, 1330 (1970).

Thus appellant's claims must fail. *Watson* certainly envisions only non-trafficking addicts, and the evidence most assuredly indicates that on January 17, 1970, appellant was nothing more than a non-addicted peddler of heroin.[7]

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[6] See note 5, *supra*.

[7] We note that in *United States* v. *Jones*, D.D.C. Crim. No. 1472-70, memorandum opinion filed April 22, 1971, the Honorable Barrington D. Parker found that an accused who possessed 20 capsules of heroin was not a narcotics seller but ruled that "his distribution of heroin to others on an occasional basis precludes him from claiming the status of a non-trafficking addict, in the strict sense of the term." *Id.* at 2. For the convenience of the Court, a copy of Judge Parker's opinion has been included in Appendix B, *infra*, p. 18.

We also must comment on our agreement with this Court's efforts to provide suitable dispositions of narcotics cases and our concern, shared by several trial judges, that *Watson* may preclude the availability of the Narcotic Addict Rehabilitation Act to those who are in need of treatment. *See United States* v. *Lindsey*, D.D.C. Crim. No. 2277-70, memorandum opinion filed January 25, 1971, at 4-5; *United States* v. *Ashton*, 317 F. Supp. 860, 862-863 (D.D.C. 1970). If the accused possessor of narcotics proves his qualifications under *Watson* and the indictment is dismissed, then the addict receives no treatment. Title I of the Narcotic Addict Rehabilitation Act, 28 U.S.C. §§ 2901-2906, cannot be used, since there will be no pending indictment, and Title III of the Act, 42 U.S.C. §§ 3411-3426, requires a voluntary petition by the addict or by a "related

II. Count two of the indictment was not defective.

Appellant argues under *Watson, supra*, that count two of the indictment, alleging a violation of 21 U.S.C. § 174, is defective since it does not specifically allege acts of trafficking. We note again that the language in *Watson* relied upon is dictum, positing that an indictment failing to allege trafficking "arguably" would be subject to dismissal. *Watson*, slip op. at 23. We point out further that appellant never raised this issue at trial and therefore, absent plain error, is precluded from raising it on appeal. FED. R. CRIM. P. 52 (b). Finally, we must reflect that since the Jones-Miller Act, 21 U.S.C. § 174, does not require proof of trafficking,[8] any attack based

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individual." If he fails to qualify as an addict *at the time of the offense* under *Watson*, it is possible that, if convicted, he will consequently be precluded from treatment under Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§ 4251-4255; for if he was not an "addict" by *Watson* standards, it is unlikely that he would be able to show the necessary loss of the power of self-control with reference to his addiction, 18 U.S.C. § 4251 (a), to qualify for Title II NARA treatment. Therefore, although *Watson* may attempt to shelter an addict from prosecution, it may in so doing deny him the opportunity for rehabilitation.

[8] 21 U.S.C. § 174 provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

upon the failure to allege trafficking must be given little consideration. Even assuming *arguendo* that appellant can now raise this issue, we maintain that his claim must fail.

A. *Congress intended to make virtually all transactions in heroin illicit.*

Even the most cursory perusal of the language in 21 U.S.C. § 174 reveals that Congress made no distinction between addict possessors and non-addict possessors or between traffickers and non-traffickers. *Cf. Turner* v. *United States*, 396 U.S. 398 (1970). Congress intended persons such as appellant to be prosecuted under this act for facilitating the concealment of narcotics, knowing that they were illegally imported, regardless of whether a given defendant is an addict or a peddler of drugs.

The remedial treatment provided by Congress for the addict-possessor is strong indication that Congress never intended to exempt him from prosecution. By excluding only the trafficker from civil commitment under Title I of NARA and requiring that the criminal proceedings be held in abeyance, Congress provided a vehicle for commitment of the mere possessor. 28 U.S.C. § 2901 (g) (2). Congress also declared that the non-trafficking possessor may be prosecuted and punished under Title I if "the Surgeon General certifies that adequate facilities or personnel for treatment are unavailable." 28 U.S.C. § 2902 (b). The non-trafficker who receives treatment can also be prosecuted if the Surgeon General later determines that he cannot be further treated. 28 U.S.C. § 2902 (c). Under these circumstances, the statute provides that the pending criminal charge is to be revived. Title II also calls for commitment of a non-trafficking addict after conviction, 18 U.S.C. § 4251-4255, and Title III states that the policy of Congress is that "certain persons charged with or convicted of violating Federal criminal laws, who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment should, in lieu of prosecution or sentencing, be civily committed . . . ." 42 U.S.C.

§ 3401. Obviously the congressional intent is to utilize criminal sanctions as vehicles for rehabilitation.

Very recently Congress again indicated its intention to prosecute non-traffickers in the Comprehensive Drub Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513 (October 27, 1970), which became effective May 1, 1971. In that legislation Congress made mere possession of narcotics a crime.

Congress has further indicated its intentions in the laws for the District of Columbia which provide for prosecution of an addict possessor under the Uniform Narcotics Act, 33 D.C. Code § 402. Also the Hospital Treatment for Drug Addicts Act, 24 D.C. Code § 601, declares that "Congress intends that Federal criminal laws shall be enforced against drug users as well as other persons . . . ."

We therefore conclude that Congress most definitely intended to include non-traffickers in prosecution under 21 U.S.C. § 174 and that the failure of the instant indictment tc allege trafficking does not make the indictment defective.

B. *Prosecution under 21 U.S.C. § 174 does not violate the Eighth Amendment.*

Robinson v. *California*, 370 U.S. 660 (1962), held that under the Eighth Amendment a state could not punish the status of addiction. The Court clearly indicated that its ruling did not apply to statutes punishing affirmative acts such as possession of narcotics. *Robinson* v. *California, supra*, 370 U.S. at 666.

This Court has ruled in the somewhat analogous area of chronic alcoholism that a chronic alcoholic cannot be prosecuted for being drunk in public. *Easter* v. *District of Columbia*, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966) (*en banc*). The possible Eighth Amendment grounds for this decision [9] have been placed in doubt by the Supreme Court's

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[9] Although the decision of reversal in *Easter* was unanimous, only four members of the Court joined in that portion of the opinion (part II) which relied on the Eighth Amendment. 124 U.S. App. D.C. at 36-38, 361 F.2d at 53-55.

decision in *Powell* v. *Texas*, 392 U.S. 514 (1968), which upheld a statute making public drunkenness a crime. In support of this ruling the Court distinguished the *Robinson* case by reflecting that the California statute involved in *Robinson* sought to punish the mere status of addiction, whereas the Texas statute in *Powell* imposed "criminal sanction for public behavior which may create substantial health and safety hazards both for appellant and for members of the general public." 392 U.S. at 532. The Court went on to emphasize (1) that the thrust of *Robinson*'s interpretation of the Eighth Amendment was that criminal sanctions may be inflicted only if the accused has committed some act, and (2) that *Robinson* never dealt with the question of whether conduct cannot constitutionally be punished because it is involuntary. 392 U.S. at 533.

Therefore, where *Robinson* and *Powell* are viewed in terms of punishment for an act, appellant's constitutional attack on 21 U.S.C. § 174 must fail. *Robinson* reaffirmed the legislative authority "to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs." 370 U.S. at 664. While the mere "status" of addiction cannot be made a crime, there are no constitutional prohibitions against criminal sanctions for the facilitating and concealment of narcotics known to have been illegally imported.[10] Thus the indictment in the instant case does not fail merely because it does not allege acts of trafficking.[11]

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[10] We note *United States* v. *McClough*, 263 A.2d 48 (D.C. Ct. App. 1970), in which the court acknowledged that the *Robinson-Powell* rationale permitted an addict to be convicted of presence in an illegal establishment under 22 D.C. Code § 1515 (a). If presence in an illegal establishment is so divorced from "status" as to be punishable, then the charge in the instant case must certainly be constitutionally acceptable as well.

[11] We must emphasize the values inherent in the use of criminal prosecutions as a means of protecting society and rehabilitating the addict. As in the case of chronic alcoholism, there is the value of getting the addict off the streets. *See Powell*, *supra*, 392 U.S. at

III. The evidence was sufficient to support the court's finding that appellant knew the drugs he possessed to have been illegally imported.

(Tr. 16-70)

Appellant argues for the first time that the trial court improperly convicted him of a violation of 21 U.S.C. § 174, since the Government's case concerning his knowledge of illegal importation was based on circumstantial evidence, and appellant testified that he did not know where heroin came from. Since he did not raise this issue in the trial court, he is now relegated to making a plain error argument. FED. R. CRIM. P. 52 (b). He cites *United tSates* v. *Cox*, 139 U.S. App. D.C. 264, 432 F.2d 1326 (1970), in which this Court adopted the *Peeples* instruction,[12] and concludes that the proof of knowledge was insufficient. In so doing appellant displays his inability to understand the effect of *Cox* on the case at bar. The decision in *Cox* was based on the necessity for *an instruction to the jury.* It did not preclude the jury from thereafter inferring from possession of narcotics that the defendant knew that the drugs were illegally imported. Thus, in the instant *non-jury* trial, the court certainly acted within its province as fact-finder in weighing the evidence, circumstantial and direct, and deciding that the inference should be applied.

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539. The importance of this is paramount since, although a drunk will merely withdraw from the crowd and seek refuge, an addict will resort to robbery for finances to support his habit.

[12] In *United States* v. *Peeples*, 377 F.2d 205 (2d Cir. 1967), the court ruled that in a prosecution under 21 U.S.C. § 174, where a defendant testifies that he does not know where heroin comes from, the trial court must instruct the jury "to acquit [the] defendant if satisfied that the defendant did not know the narcotic was imported." *Id.* at 210.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HENRY F. GREENE,
JEROME WIENER,
Assistant United States Attorneys.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 798-70

[Filed October 26, 1970]

UNITED STATES OF AMERICA

v.

NATHANIEL A. HARRIS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court for trial, and the defendant having knowingly and intelligently waived his right to a trial by jury (Transcript of Proceedings, September 24, 1970, hereinafter "Tr." pp. 51-52), the Court finds beyond a reasonable doubt, after having heard testimony and received evidence, that:

1. On January 17, 1970, within the District of Columbia, the defendant, Nathaniel A. Harris, was in possession of one hundred seventy-nine capsules containing heroin (Tr. 19).

2. Neither the gelatin capsules containing the heroin, nor the heroin itself, were contained in or came from an original stamped package (Tr. 25).

3. In light of the particular circumstances of this offense, including the defendant's admitted use of narcotics for a period of twelve years (Tr. 7), his admitted dealing in narcotics (Tr. 9-10, 14), his having purchased narcotics from as many as fifty different sources (Tr. 70) and his knowledge of various sources of narcotics throughout the District of Columbia (Tr. 70-71), as well as the facts that it is illegal to import heroin into this country

or manufacture it here, it is likewise illegal to grow the opium poppy (the source of heroin) in this country without a license, and the flow of legally imported opium into the United States is too tightly controlled to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium (*Turner* v. *United States*, 396 U.S. 398, 408-418 (1970)), the defendant, Nathaniel A. Harris, received and facilitated the concealment of the above-described heroin, knowing it had been imported into the United States contrary to law.

4. In light of the particular circumstances of this offense, including the absence of any physical indicia or evidence of narcotics use or addiction at the time of defendant's arrest (Tr. 20, 38), the absence of any narcotics paraphernalia on or about his person at the time of arrest (Tr. 14, 15), the absence of any Metropolitan Police Department record of a request for or the administration of medical treatment to the defendant for withdrawal symptoms on the day of or the day after his arrest (Tr. 43) in circumstances where such records are normally kept (Tr. 25), the fact that the defendant's only prior conviction in connection with narcotics possession occurred several years prior to this offense (Tr. 48, 71-72), and the fact that the defendant did not seek methadone treatment until three months after his arrest in this case (Tr. 11), as well as the Court's doubts as to the credibility of the defendant's testimony,[1] the defendant, Nathaniel A. Harris, was not addicted to narcotics at the time of his possession of the above-described heroin.

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[1] The defendant testified that although he had been an addict for some twelve years (Tr. 7), he had not sold narcotics until two weeks before his arrest for this offense (Tr. 63); yet, he had been convicted several years earlier for possession and sale of narcotics (Tr. 48, 71-72). He testified that he sought medical attention for withdrawal symptoms during the night after his arrest (Tr. 41-42); yet no Metropolitan Police Department record of such a request exists (Tr. 43), although such records are normally kept (Tr. 25). In addition, the defendant was convicted of petit larceny in 1965 (Tr. 72).

5. Even if the defendant, Nathaniel A. Harris, had been addicted to narcotics at the time of his arrest for possession of the above-described heroin, in light of the particular circumstances of the offense, including the observations of the arresting officers as to at least seven different sales of narcotics by the defendant to other persons (Tr. 21), the defendant's admission that he was selling narcotics (Tr. 9-10, 14), the large quantity of narcotics-filled capsules found on the defendant's person (Tr. 19), and the heretofore-noted absence of any physical or other indicia of defendant's addiction at the time of his arrest (Tr. 14, 15, 20, 38, 43), the defendant, Nathaniel A. Harris, did not possess the above-described heroin solely for his own use.

WHEREUPON, the Court concludes that as to each count of the indictment, the defendant, Nathaniel A. Harris, is guilty as charged.

/s/ John J. Sirica
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1472-70

[Filed April 22, 1971]

UNITED STATES OF AMERICA

v.

MICHAEL J. JONES, JR.

FINDINGS AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING MOTION TO DISMISS THE INDICTMENT

This matter having come before the Court on a pre-trial motion to dismiss the indictment based upon *Watson* v. *United States*, D.C. Cir. No. 21,186, decided July 15, 1970 (*en banc*), wherein it was suggested by that Court in dictum that a non-trafficking addict possessor may move pursuant to the instant motion and in it assert that the narcotic statutes under which he is indicted (26 U.S.C. § 4704 (a) and 21 U.S.C. § 174) are not to be read as applicable to him because the acquisition and possession of the narcotics were solely for the defendant's own use, and the Court, having heard the testimony and received evidence, and following the submission of memoranda from counsel, now make the following Findings and Conclusions of Law in support of the order denying the motion to dismiss the indictment.

FINDINGS

1. On June 28, 1970, at 10:00, the defendant took a narcotic drug, specifically, heroin.

2. On June 29, 1970, within the District of Columbia, the defendant Michael J. Jones was in possession of twenty capsules of heroin.

3. Defendant was arrested at approximately 1:30 a.m. on June 29, 1970, and was in custody until June 30, 1970. During this time he experienced some discomfort but there is no credible evidence to suggest that he was undergoing severe withdrawal pains, although he had taken heroin earlier.

4. A physician who had examined the defendant some two and one-half months before his arrest characterized him as a mild or moderate user of heroin.

5. Upon occasion the defendant would abstain from the use of heroin for periods of up to three days.

6. Following a period of hospitalization, defendant abstained from the use of heroin for a period of fifteen days.

7. Following this fifteen day period, the defendant returned to the use of heroin for the pleasure it afforded him.

8. From time to time the defendant distributed heroin to other persons.

Conclusions of Law

1. At the time of his arrest, defendant was a user of narcotics.

2. While defendant is not a narcotics seller, his distribution of heroin to others on an occasional basis precludes him from claiming the status of a non-trafficking addict, in the strict sense of that term.

3. Nor is defendant an addict within the contemplation of *Watson* v. *U.S.*, —— F.2d ——, —— U.S. App. D.C. —— (1970). That case is a logical extension of *Robinson* v. *California*, 370 U.S. 660 (1962), in which the Supreme Court held that it is a violation of the Eighth Amendment to declare a physical illness, as narcotic addiction, a criminal act. *Robinson* stressed the involuntary nature of addiction. Although *Watson* did not define "addict," this Court holds that in light of the *Robinson*

case, an "addict" for the purposes of *Watson* is one "who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to this addiction." Narcotic Addict Rehabilitation Act of 1966, Title II, 18 U.S.C. § 4251(a). As evidenced by his lack of serious withdrawal symptoms at the time of his arrest, his practice of abstaining from drugs from time to time, and his admission that after a two week period of nonusage, he began taking heroin again only because of the pleasure it gave him, the Court finds that defendant is not so addicted "as to have lost the power of self-control with reference to his addiction."

It is, therefore, this 22nd day of April, 1971, ORDERED, that the Motion of the defendant to Dismiss, shall be, and hereby is, denied.

/s/ Barrington D. Parker
Judge

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